No. 9469

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT 3

UNITED STATES OF AMERICA,

Appellant,

vs.

ARMATURE EXCHANGE, INCORPORATED, a corporation, also known as THE ARMATURE EXCHANGE, a corporation, also known as THE ARMATURE EXCHANGE INCORPORATED, a corporation,

Appellee.

PETITION FOR REHEARING EN BANC ON BEHALF OF APPELLEE, THE ARMATURE EXCHANGE, A CORPORATION.

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To the Honorable Circuit Court of Appeals for the Ninth Circuit:

Appellee The Armature Exchange, a corporation, respectfully petitions for a rehearing *en banc,* of this appeal and urges the court to reconsider its decision in this case for the following reasons and upon the following grounds:

I.

The Decision Is in Conflict With the Law, the Statute and Decisions of the Supreme Court and Circuit Courts of Appeals for Other Circuits.

The Supreme Court of the United States has announced in its decision in the case of *Cadwalader v. Jessup & Moore,* 149 U. S. 350:

> "The uncontradicted testimony is to the effect that the only commercial use or value of the old india rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india rubber they contained, as a substitute for crude rubber, *and not by reason of any preparation or manufacture which they had undergone;* that they could not fairly be called 'articles composed of india rubber,' and as such dutiable at 25 per centum ad valorem; and that, although the shoes may have been originally manufactured articles composed of india rubber, they had lost their commercial value as such articles, and substantially were merely the material called 'crude rubber.' They were not fabrics or india rubber shoes, because they had lost substantially their commercial value as such." (Italics supplied.)

It is respectfully submitted that the armatures which are the subject under discussion in the instant case had a value far in excess of their value as raw material because of the manufacturing processes they had previously undergone. Under the rule established by the above case it is

essential that the only value be that of raw material. That if the value of the article results from the manufacturing process previously undergone, then the value is because of that manufacturing process, and not as raw material. The record indicates that the appellee herein paid from fifty cents to one dollar for each armature, which was far in excess of the junk or raw material value. [R. 72.]

Appellee cites *Hartranft v. Wiegmann,* 121 U. S. 609, as an additional authority on the question of who is a manufacturer and what is manufacturing. The issue in that case concerned the rate of duty to be levied upon certain shells depending upon whether they were or were not "manufactured." The question involved and the facts are stated in the opinion by Mr. Justice Blatchford, as follows, 1 C. 613-14:

> "The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that these shells in question were to be sold for ornaments, but that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that the shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufacturers of shells, within the meaning of the statute."

The conclusion of the court and the reasoning supporting it are set forth in the following excerpt from the opinion l. c. 615:

> "We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufacturers, but were shells not manufactured, and fell under that designation in the free list. They are still shells. *They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.* The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In 'Schedule M' of Section 2504 of the Revised Statutes, page 475, 2nd Edition, a duty of 30 per cent *ad valorem* is imposed on 'coral cut or manufactured'; and in Section 2505, page 484, 'coral marine, unmanufactured,' is exempt from duty. These provisions clearly imply that, but for the special provisions imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frazee v. Moffit,* 20 Blatchf. 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, although labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence v. Allen,* 48 U. S. 7 How. 785, it was held that india rubber shoes, made in Brazil, by simply allowing the sap of the india rubber tree to harden upon a mold, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into

a new form, capable of use and design to be used in such new form. In *United States v. Potts,* 9 U. S. 5 Cranch 284, round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States v. Wilson,* 1 Hunt's Merchants' Magazine 167, Judge Betts held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured.

"We are of the opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on citizens upon vague or doubtful interpretations.' *Powers v. Barney,* 5 Blatchf. 202; *U. S. v. Isham,* 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds,* 11 Exch. 190, 191; *Adams v. Bancroft,* 3 Sumn. 384." (Italics supplied.)

The third case cited is *Anheuser-Busch Brewing Association v. U. S.,* 207 U. S. 556, in which the plaintiff sued to recover certain import duties which it paid on corks designed for use in bottling beer.

Under the act there involved plaintiff was required to prove as the basis of its refund or "drawback" that the corks involved were not manufactured corks, but merely materials imported to be used in the manufacture of corks in the United States. The evidence showed that the corks when imported into this country from Spain had already

been cut by hand to the required size. It was further shown that in such condition, however, they were not suitable for use in bottling beer because they would not retain the gas in the bottle and because they would impart a cork taste to the beer, thereby making it unmarketable and unfit for use. After importation, however, the corks were subjected in the brewing company's plant to various processes and treatment consuming several days of time, during which the corks were treated, processed, sealed and coated so as to render them useful for the intended purpose. The court found that the process to which the corks were subject did not constitute manufacture; that the corks were manufactured before they were imported and that the brewing company was not entitled to its refund. In the opinion by Mr. Justice McKenna it is said, l. c. 559:

> "The corks in question were, after their importation, subject to a special treatment which, it is contended, caused them to be articles manufactured in the United States of 'imported materials' within the meaning of Section 25. The Court of Claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.
>
> "The treatment to which the corks were subjected is detailed in Finding 3, inserted in the margin.
>
> "In opposition to the judgment of the Court of Claims counsel have submitted many definitions of 'manufacture,' both as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far if made to

> cover the treatment detailed in Finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition,—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation, we are involved in refinements and in impractical niceties. Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann,* 121 U. S. 609, 7 Sup. Ct. Rep. 1240. *There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'* This cannot be said of the corks in question. A cork put through the claimant's process is still a cork." (Italics supplied.)

Appellee contends that the preceding cases are directly in point and are authority supporting the contention that said appellee is not a manufacturer. Under the rule laid down by the court in *Hartranft v. Wiegmann* and *Anheuser-Busch Brewing Association v. U. S., supra,* it is necessary that a new and different article of commerce emerge in order for "manufacturing" to exist. Has not this Honorable Court made an unwarranted distinction in holding that these two cases are not authority for the position of this taxpayer that it is not a "manufacturer or producer" of armatures, simply because those cases

arise under the tariff laws? At page three of the opinion, it is stated:

> "In our opinion neither of the cited cases is authority for the position of the taxpayer that it is not a 'manufacturer or producer' of armatures. In both cases the raw materials were not subject to the terms of the statute involved, the statutes relating solely to 'manufactures.' Certainly in such statutes there must be a 'transformation.' "

Appellee calls attention to the preceding paragraph of the opinion of this Honorable Court. It is there stated that the raw materials were not subject to the terms of the statutes involved. The same is true in the instant case. The raw materials are not subject to tax imposed by the act, the statute relates solely to sales by the "manufacturer or producer."

In defining the meaning of words used in statutes imposing excise taxes it is always the practice of the courts to look to other cases, including cases arising under the tariff and patent laws for guidance. In this regard the petitioner herein also relies on *American Fruit Growers, Inc. v. Brogdex,* 283 U. S. 1; *Goodyear Shoe Machinery Company v. Jackson,* 112 Fed. 146 (C. C. A. 1, 1901); *Foglesong Machinery Company v. J. D. Randall Company,* 237 Federal 893 (C. C. A. 6, 1917); *Ely Norris Safe Company v. Mosler Safe Co.,* 62 Fed. (2d) 524 (C. C. A. 2, 1933); and *Hess-Bright Mfg. Co. v. Bearing Co.,* 271 Fed. 350 (D. C. Pa., 1921).

II.

Treasury Regulations 46, Article 4, Approved June 18, 1932, Regulating Taxation of Automobile Parts and Accessories, Under Paragraph 606 (c) of the Revenue Act of 1932, Does Not Purport to Levy a Tax on the Sale of Repaired or Rebuilt Automobile Parts or Accessories.

Regulations 46, Article 4 was adopted for the purpose of clarifying the Revenue Act of 1932. Otherwise it would be claimed that certain operations which in themselves involved no manufacturing whatever, were not subject to the Act, even though automobile parts or accessories were produced. For instance, it would be possible to purchase various items which are exempt from tax and assemble them into a taxable article and sell them tax free because there was no manufacturing while, however, there was certainly production, and the person so combining or assembling them would certainly be a producer.

It was conceded by the appellant that there is no tax upon immediate repairs. However, this Honorable Court holds that because of the fact that appellee operates on a large scale, places quantities of rewound armatures in stock and sells them under a trade name, that it is a "manufacturer or producer." This places an undue burden on this petitioner because of the size of its operations and the service which it is prepared to render.

Even though this petitioner conceded, which it does not, that the above regulations had the force and effect of law, it would still be too vague and incomplete to impose a tax upon the operations of this company. This Honorable Court is well aware of the rule that the literal meaning of words can be insisted on in resistance to a taxing statute.

Certainly the finding that this taxpayer is not a "manufacturer or producer" would not reduce the statute to empty declarations as is inferred by the court in the opinion on file herein.

It is conceded that had this taxpayer purchased new cores with which to produce armatures that it would be subject to the Revenue Act of 1932. Petitioner cites *Thurman, Collector v. Swisshelm* (C. C. A. 7), 36 Fed. (2d) 350. The principle underlying the *Swisshelm* case is no different from the instant case. Swisshelm commenced his process with an automobile, completely manufactured and tax paid by the manufacturer; the plaintiff in this case commenced its work with an armature previously manufactured and tax paid by the manufacturer. When Swisshelm finished his process, he still had an automobile—he had created nothing new; when appellee in this case completed the rewinding process, it still had an armature—it had created nothing new. In the *Swisshelm* case the court distinguished the case of *Klepper v. Carter* (C. C. A. 9), 286 Fed. 370, which is cited by this court, and said L. C. 351:

> "The facts are different in that there (referring to the Klepper case) no truck figured in the transaction until the parts had been assembled and connected; while here appellees bought the completed automobile, upon which the tax had already been paid."

There is no evidence in the record to sustain the court's statement that this taxpayer utilized used cores, which had been *discarded and were out of circulation* in the completed article.

Conclusion.

By reason of the fact that the question involved herein is of grave importance to not only the appellee, but also to many other companies throughout the United States, engaged in the same business, and because certain misunderstandings have already arisen wherein some of them claim not to be affected by the decision because their operations differ somewhat from those detailed in the opinion and findings of the trial court, it is respectfully submitted that this Honorable Court grant a rehearing *en banc,* of this appeal in order that the full import of the decisions of the Supreme Court and Circuit Courts of Appeals involving patent and tariff laws may be applied by this Honorable Court in its decision of the appeal.

It is respectfully submitted that under the statute, regulations and decisions of the Supreme Court and various Circuit Courts of Appeals that this appellee is not subject to the tax imposed by Section 606 (c) of the Revenue Act of 1932, and therefore appellee's petition for rehearing *en banc* should be granted.

Respectfully submitted,

DARIUS F. JOHNSON,
Attorney for Appellee.

Certificate of Counsel.

I, Darius F. Johnson, counsel for the above appellee, do hereby certify that the foregoing petition for rehearing *en banc* of this cause is presented in good faith and not interposed for the purpose of delay.

DARIUS F. JOHNSON.